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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL BERNARD MARSHALL,

Defendant and Appellant.

E071375

(Super.Ct.No. FVI17002814)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin,
Judge. Affirmed.

Michael Bernard Marshall, in pro. per.; and Jason Szydlik, under appointment by
the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

In November 2005, defendant and appellant Michael Bernard Marshall helped his codefendant burn the victim's body in the desert. In November 2017, pursuant to a negotiated disposition, defendant pled guilty to accessory after the fact (Pen. Code, § 32).¹ In return, the murder charge was dismissed and defendant was sentenced to the upper term of three years in county jail with 84 days of credit for time served. In addition, pursuant to the plea agreement, defendant was released on a *Vargas*² waiver and ordered to return to court for resentencing. Approximately nine months later, defendant was resentenced. At that time, the court imposed the upper term of three years, suspended execution of sentence, and placed defendant on probation for one day. The court also ordered defendant to pay victim restitution in the amount of \$16,347.73, jointly and severally with the codefendant. Defendant appeals from the restitution order. Based on our independent review of the record, we find no error and affirm the restitution order.

¹ All future statutory references are to the Penal Code unless otherwise stated.

² *People v. Vargas* (1993) 13 Cal.App.4th 1653 (*Vargas*).

II

FACTUAL AND PROCEDURAL BACKGROUND³

Around Thanksgiving in November 2005, codefendant Malachi Dawson shot and killed Noel Cornelius in Dawson's apartment. Subsequently, codefendant Dawson and defendant took the victim's body to the desert and burned it.

On October 23, 2017, an amended complaint was filed charging defendant with murder (§ 187, subd. (a)).

On November 21, 2017, the People amended the complaint to add count 2, accessory after the fact (§ 32). Pursuant to a negotiated plea agreement, defendant thereafter pled guilty to count 2. In exchange, defendant was promised that the murder charge would be dismissed, and defendant would be sentenced to three years in county jail with credit for time served and released on a *Vargas* waiver. The plea agreement also indicated that if defendant complied with the terms and conditions of his *Vargas* waiver, defendant would be resentenced to probation. In addition, the plea agreement included a waiver of the right to appeal. After directly examining defendant, the trial court found that defendant had read and understood his plea form and that defendant understood the nature of the charges, the consequences of the plea, and his constitutional rights. The court further found that defendant had knowingly, intelligently, freely, and voluntarily waived his constitutional rights, that his plea was entered into freely and voluntarily, and

³ The factual background is taken from the preliminary hearing transcript in codefendant Dawson's case.

that there was a factual basis for the plea. Immediately thereafter, defendant was sentenced in accordance with his plea agreement and the murder charge was dismissed. Defendant was awarded 84 days of credit for time served.

The resentencing hearing was held on August 24, 2018.⁴ At that time, the trial court resentenced defendant to the upper term of three years, suspended execution of sentence, and placed defendant on probation for one day. Furthermore, pursuant to a stipulation, the court ordered defendant and codefendant Dawson to jointly and severally pay victim restitution in the amount of \$16,347.73 as follows: \$8,847.73 to the victim's brother, and \$7,500 to the Victim Compensation Board.

On September 25, 2018, defendant filed a timely notice of appeal from the restitution order.

III

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him. Upon examination of the record, counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issue, and requesting this court to conduct an independent review of the record.

⁴ At that time, codefendant Dawson pled guilty to voluntary manslaughter (§ 192, subd. (a)) and was sentenced to 11 years in state prison.

An appellate court conducts a review of the entire record to determine whether the record reveals any issues which, if resolved favorably to defendant, would result in reversal or modification of the judgment. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Feggans* (1967) 67 Cal.2d 444, 447-448; *Anders v. California, supra*, 386 U.S. at p. 744; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-112.)

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his one-page letter brief, defendant asserts, without citation to authority, that his trial counsel informed him that he would be responsible for fines and fees in the amount of \$300, but failed to inform him that he would be mandated to pay victim restitution at the time he pled guilty. Defendant also complains that he was “unaware of the meaning of the term of ‘joint and several’” when the court issued restitution in his codefendant’s matter. Defendant is essentially claiming ineffective assistance of counsel. Because there is nothing in the record to support defendant’s claims, we reject them.

“In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it “fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.” [Citations.] Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” [Citation.] If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel must be

rejected “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” [Citation.]’ [Citation.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) In this case, defendant fails to demonstrate ineffective assistance of counsel. Accordingly, because the record sheds no light on why trial counsel failed to inform defendant that he would be mandated to pay victim restitution, defendant fails to demonstrate ineffective assistance of counsel. (*Ibid.*)

In addition, the California Constitution provides that crime victims have a right to restitution when they suffer losses as a result of criminal activity. (Cal. Const., art. I, § 28, subd. (b)(13)(A) & (B); see *People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*) [discussing former Cal. Const., art. I, § 28, subd. (b)].) This constitutional mandate is implemented by Penal Code section 1202.4, which provides in pertinent part: “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (§ 1202.4, subd. (f); see § 1202.4, subd. (a)(1); *Giordano*, at p. 656.) A “victim” for purposes of restitution includes not only the actual victim of the offense, but also immediate family members as

well as a spouse or child “who has sustained economic loss as the result of a crime.” (§ 1202.4, subd. (k)(1), (3)(A).) “[T]he court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so” (*Giordano*, at p. 656, italics omitted.)

“The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution.” (§ 1202.4, subd. (f)(1).) “At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim’s testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] ‘Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim. [Citations.]’ [Citation.]” (*People v. Millard* (2009) 175 Cal.App.4th 7, 26; see *Giordano*, *supra*, 42 Cal.4th at p. 664.)

Here, the parties stipulated to the restitution amount. Moreover, at the time he was resentenced and ordered to pay victim restitution, defendant failed to object to the amount or ask understanding of what “joint and several” meant. Generally, “claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices” are forfeited if not raised below. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) “In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Id.* at p. 354.) The California Supreme Court has determined that claims of error regarding restitution orders,

including claims based on the amount of the order or the sufficiency of the evidence to support the order, are forfeited if not raised in the trial court. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075; *People v. Anderson* (2010) 50 Cal.4th 19, 26.)

Based on the foregoing, we reject defendant's claims.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

IV

DISPOSITION

The restitution order is affirmed.

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CODRINGTON

J.

We concur:

MILLER

Acting P. J.

SLOUGH

J.